FILED
APR 23 2003
CLERK

No. 02-1402

IN THE

Supreme Court of the United States

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

JOHN L. MOORE, JR.*
CRISTEN E. SIKES
PIPER RUDNICK, LLP
1200 19th Street, NW
Washington, D.C. 20036
(202) 861-3900

DENNIS M. MOORE
SENIOR ASSOCIATE GENERAL COUNSEL, LITIGATION NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, NE
Washington, D.C. 20002
(202) 906-2750

Attorneys for National Railroad Passenger Corporation

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

31 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

The question presented by this case is:

1) Whether a prior judgment in Amtrak's favor that the Pennsylvania Public Utility Commission is not an "arm of the state" and is not entitled to Eleventh Amendment immunity was properly given preclusive effect by the court below to prevent the Commission from relitigating the same issue against Amtrak in this case.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
Amtrak's 1987 Action Against the PUC	3
The 1997 Denial of the PUC's Claim of Eleventh Amendment Immunity	4
The 2001 Decision Giving Preclusive Effect to the Prior Judgment	5
REASONS FOR DENYING THE PETITION	8
I. THE PUC IMPROPERLY SEEKS REVIEW OF QUESTIONS NOT PRESENTED TO OR DECIDED BY THE COURTS BELOW	8
II. THE THIRD CIRCUIT PROPERLY APPLIED ISSUE PRECLUSION TO THE PUC'S CLAIM OF ELEVENTH AMENDMENT IMMUNITY AGAINST AMTRAK	9
A. Decision of a Claim of Eleventh Amendment Immunity Is "Essential" to the Judgment for Preclusion Purposes	10
B. The Third Circuit's Holding Is Entirely Consistent With This Court's Precedent	12
C. The "Unmixed Questions of Law" Exception to Collateral Estoppel Is Not Applicable to the PUC's Attempt to Relitigate its Alleged Entitlement to Eleventh Amendment Immunity	13

TABLE OF CONTENTS—Continued

Page

1. The PUC's Contention That the Third Circuit Misapplied a Properly Stated Rule of Law Does Not Merit Certiorari 13
2. The PUC's Entitlement to Immunity is Not a Pure, "Unmixed" Questions of Law 13
3. Even If the PUC's Alleged Entitlement to Immunity Were a Pure Issue of Law, Preclusion Would Still Be Appropriate 15
4. The Action Below and Amtrak's Initial Action Against the PUC Are Related, and the PUC's Claim of Immunity in this Case is Identical to its Claim in the Prior Litigation 16

III. THE PUC'S HYPOTHETICAL CONCERNS ABOUT POSSIBLE CLAIMS OF OFFENSIVE NON-MUTUAL ESTOPPEL DO NOT WARRANT THIS COURT'S REVIEW 18

IV. THE ISSUE OF THE PUC'S CLAIMED IMMUNITY WILL NOT "EVADE REVIEW" IF CERTIORARI IS DENIED 20

CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Alden v. Maine, 527 U.S. 706 (1999) 19
Burlington N.R.R. v. Hyundai Merchant Marine Co., 63 F.3d 1227 (3d Cir. 1999) 17
Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140 (3d Cir. 1995) 4, 14
Ex Parte Young, 209 U.S. 123 (1908) 4
Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) 9
Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 14
Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973) 12
In re Kulp Foundry, 691 F.2d 1125 (3d Cir. 1982) 22
Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694 (1982) 10, 11
Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 19
Mathias v. Worldcom Technologies, Inc., 535 U.S. 682 (2002) 12
Minnesota Humane Society v. Clark, 184 F.3d 795 (8th Cir. 1999) 20
Montana v. United States, 440 U.S. 147 (1979) 11, 16, 21
National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 9
National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 488 U.S. 893 (1988) 3
National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 288 F.3d 519 (3d Cir. 2002) ..... *passim*
National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 178 F.3d 1280 (3d Cir. 1999) 5

TABLE OF AUTHORITIES—Continued

Page

National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 848 F.2d 436 (3d Cir. 1988) 3

National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 159 F. Supp. 2d 28 (E.D. Pa. 2001) 6

National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 1998 WL 103377 (E.D. Pa. Feb. 23, 1998) 5, 8-9

National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 1997 WL 734016 (E.D. Pa. Nov. 13, 1997) 5

National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 1997 WL 597963 (E.D. Pa. Sept. 15, 1997) 4, 10, 14

National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) 3

National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 665 F. Supp. 402 (E.D. Pa. 1987) 3

New York City Employees' Retirement Sys. v. Dole Food Co., Inc., 969 F.2d 1430 (2d Cir. 1992) 23

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) 19

Patrick v. Burget, 486 U.S. 94 (1988) 9

Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 12, 14

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 4

Southeastern Pennsylvania Trans. Auth. v. Pennsylvania Pub. Util. Comm'n, 210 F. Supp. 2d 689 (E.D. Pa. 2002) 21

TABLE OF AUTHORITIES—Continued

Page

United States v. Mendoza, 464 U.S. 154 (1984).... 19
United States v. Moser, 266 U.S. 236 (1924) 15
United States v. Stauffer Chem. Co., 464 U.S 165 (1984)..... 15-16, 17, 22
Weinstein v. Bradford, 423 U.S. 147 (1975)..... 20
Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998)..... 11

STATE CASES

City of Chester v. Pennsylvania Pub. Util. Comm'n, 788 A.2d 379 (Pa. 2001) 3
City of Chester v. Pennsylvania Pub. Util. Comm'n, 773 A.2d 1280 (Pa. Commw. Ct. 2001) 3

FEDERAL STATUTES

49 U.S.C. § 24101 ..... 1, 18
49 U.S.C. § 24301 ..... 3, 5, 17, 18
49 U.S.C. § 24902 ..... 5, 18

RULES

FED. R. CIV. P. 59 5
FED. R. CIV. P. 60 5
SUP. CT. R. 10 13

OTHER AUTHORITIES

17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4036 (2d ed. 1988) 9
RESTATEMENT (SECOND) OF JUDGMENTS § 1 (1982) 10
RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) 16, 18

IN THE

Supreme Court of the United States

No. 02-1402

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

National Railroad Passenger Corporation ("Amtrak") filed the action below seeking declaratory and injunctive relief.[1] Amtrak initiated the case below to enforce compliance with

[1] Amtrak is a corporation established by Congress pursuant to the Rail Passenger Service Act of 1970, 49 U.S.C. § 24101 *et seq.* (the "RPSA"). The federal government owns 100% of Amtrak's preferred stock. American Premier Underwriters, Inc. owns 56% of Amtrak's common stock. Burlington Northern/Santa Fe Railroad Company owns 36% of Amtrak's common stock.

federal law and with the terms of its Northeast Corridor Freight Operating Agreement ("FOA"), an agreement pursuant to which defendants Norfolk Southern Railroad Company ("NS") and CSX Transportation, Incorporated ("CSXT") operate freight railroad traffic over Amtrak's rail line. Amtrak's action sought to enjoin the petitioner, the Pennsylvania Public Utility Commission ("PUC" or "the Commission"), from adjudicating issues preempted by federal law or subject to arbitration and to prevent the PUC from ordering Amtrak to participate in the PUC proceedings. In addition, Amtrak's action sought to prevent NS and CSXT from litigating arbitrable questions relating to railroad operating rights under the FOA in a proceeding originally brought by the Southeastern Pennsylvania Transportation Authority ("SEPTA") before the PUC.

The PUC responded to Amtrak's complaint by filing a motion to dismiss based in part on the Commission's assertion that it is an "arm of the state" entitled to Eleventh Amendment immunity. Amtrak opposed the PUC's motion on various grounds, including that in litigation between Amtrak and the PUC in 1997, the district court decided that the PUC was not an "arm of the state" and was not entitled to Eleventh Amendment immunity from suits brought by Amtrak. The Court also ruled that the 1997 judgment determining that question precluded the PUC from relitigating the issue against Amtrak. The district court denied the PUC's motion to dismiss and agreed with Amtrak that the 1997 judgment precluded the PUC from relitigating whether it was an "arm of the state" entitled to Eleventh Amendment immunity. Pet. App. at 39a-40a. Because this case involves the preclusive effect of a prior federal judgment, Amtrak sets out the facts and proceedings relevant to the judgment giving rise to preclusion.

Amtrak's 1987 Action Against the PUC

On June 30, 1987, the United States District Court for the Eastern District of Pennsylvania issued a declaratory judgment that PUC assessments on Amtrak for public highway bridges violated Amtrak's federal exemption under the Rail Passenger Service Act ("RPSA"), 49 U.S.C. § 24101 *et seq.*, from the imposition of state and local taxes or fees. The district court also issued a permanent injunction barring the PUC from imposing on Amtrak public highway bridge maintenance costs arising out of the replacement of the Cassatt Avenue highway bridge in the Townships of Tredyffrin and Easttown, Pennsylvania. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 665 F. Supp. 402, 412 (E.D. Pa. 1987) (hereinafter "*Amtrak*"). The Third Circuit affirmed, stating that "Amtrak was to be exempt . . . '*to the same extent as the United States is exempt* from the payment of such taxes or other fees.'" 848 F.2d 436, 440 (3d Cir. 1988) (quoting H.R. Rep. No. 81, 97th Cong., 1st Sess. 21 (1981)), *cert. denied,* 488 U.S. 893 (1988), *permanent injunction enforced,* 1991 WL 998 (E.D. Pa. Jan. 2, 1991. The district court declared that the PUC's attempt to impose bridge maintenance costs on Amtrak constituted a "tax or fee" from which Amtrak was exempt under 49 U.S.C. § 24301(*l*)(1) (the former 45 U.S.C. § 546b). *Amtrak*, 665 F. Supp. at 412. The district court also enjoined the PUC from assessing Amtrak for the costs of maintenance and repair of the Cassatt Avenue Bridge.[2] *Id.*

---

[2] The PUC has twice unsuccessfully sought review in this Court of federal judgments holding that Amtrak is immune under the RPSA from PUC authority. *See City of Chester v. Pennsylvania Pub. Util. Comm'n,* 773 A.2d 1280 (Pa. Commw. Ct.), *appeal denied,* 788 A.2d 379 (Pa.), *cert. denied,* 535 U.S. 951 (2002); *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 665 F. Supp. 402, 412 (E.D. Pa. 1987), *aff'd,* 848 F.2d 436 (3d Cir.), *cert. denied,* 488 U.S. 893 (1988).

The 1997 Denial of the PUC's Claim of Eleventh Amendment Immunity

On May 6, 1997, the PUC moved the district court for dissolution of the injunction, citing this Court's decision in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996). The PUC argued that it is an "arm of the state" and immune from suit in federal court under the Eleventh Amendment, and thus that the district court could not modify or maintain the permanent injunction against the PUC.

On September 15, 1997, the district court issued a memorandum opinion in which it denied the PUC's Motion for Dissolution. In a 31-page opinion, the district court carefully analyzed the evidence provided by the PUC [3] and rejected the PUC's claim that it is an "arm of the state" entitled to Eleventh Amendment immunity under the reasoning of *Seminole Tribe. National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 1997 WL 597963 (E.D. Pa. Sept. 15, 1997) (Pet. App. 55a-65a). The PUC did not appeal from that order.[4]

The PUC then sought reconsideration of the September 15, 1997, decision, but the district court denied the PUC's request

---

[3] *See* Pet. at 4 (noting that the district court's determination that the PUC failed to establish that it is an "arm of the state" in the 1997 litigation was "based upon [the PUC's] motion and the attached supporting documentation"); *see also* Pet. App. at 16a ("In support of its request for relitigation [of the "arm of the state" issue] the PUC submitted evidence of particular circumstances which supplemented its submission in 1997"). The district court analyzed the evidence offered by the PUC under *Christy v. Pennsylvania Turnpike Comm'n,* 54 F.3d 1140 (3d Cir. 1995).

[4] In the 1997 action and the 2001 action, Amtrak also asserted federal jurisdiction under *Ex Parte Young,* 209 U.S. 123 (1908). Because the district court determined that the PUC is not an "arm of the state" in 1997, and that the PUC was not entitled to relitigate that issue in 2001, the district court did not reach the *Ex Parte Young* issue in either the 1997 or the 2001 litigation.

as untimely. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 1997 WL 734016 at *2 (E.D. Pa. Nov. 13, 1997). The district court held that the PUC's motion was properly viewed as one under FED. R. CIV. P. 59(e) and that it had been untimely filed. *Id.* As a result, the district court had no jurisdiction to consider the PUC's request. Once again, the PUC did not appeal from this order.

On December 19, 1997, the PUC filed yet another motion with the district court, this time citing FED. R. CIV. P. 60(b) as authority. On February 23, 1998, the district court entered an order denying this second motion for reconsideration. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 1998 WL 103377 (E.D. Pa. Feb. 23, 1998). The district court specifically found that the PUC had done nothing more than "reargue[] issues that have already been decided at various times by this Court." *Id.* at *1. The district court also noted that it had previously considered and rejected the PUC's arguments under *Seminole Tribe. Id.* at *2 n.1. Those matters had therefore been decided and were barred from relitigation by *res judicata. Id.* at *2.

On March 23, 1998, the PUC noted an appeal from the February 23rd Order, but the United States Court of Appeals for the Third Circuit dismissed the PUC's appeal for lack of jurisdiction. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 178 F.3d 1280 (3d Cir. 1999) (table).

The 2001 Decision Giving Preclusive Effect to the Prior Judgment

Amtrak brought the action below pursuant to its authorizing statute, the RPSA, 49 U.S.C. §§ 24301(g) and 24902(j), seeking declaratory and injunctive relief against the PUC. The Commission responded to Amtrak's complaint with a motion to dismiss. In its motion, the PUC argued, among other things, that it was an "arm" of the Commonwealth of Pennsylvania and thus immune from suit

under the Eleventh Amendment of the Constitution. Amtrak opposed the PUC's motion to dismiss, arguing that the Commission was precluded from relitigating its status for Eleventh Amendment purposes, because in 1997 Amtrak had already won a prior judgment against the PUC on the same issue. Amtrak also responded to the substance of the PUC's arguments, noting that they were precisely the same arguments that the PUC had put before the district court in 1997.

In an opinion issued May 10, 2001, the district court denied the PUC's motion to dismiss. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 159 F. Supp. 2d 28 (E.D. Pa. 2001) (Pet. App. 25a-44a). The district court found that "[t]he issue of the PUC's Eleventh Amendment immunity has already been thoroughly litigated between Amtrak and the PUC in this Court." Pet. App. at 39a. Citing its September 15, 1997 judgment that the PUC is not an "arm of the state" and its February 23, 1998, order denying the PUC's second request for reconsideration, the district court concluded that application of collateral estoppel was appropriate. *Id.* at 39a-40a.

The PUC noted an interlocutory appeal to the Third Circuit. That court held that the district court had properly applied the doctrine of collateral estoppel (issue preclusion) to prevent the PUC from relitigating its claim to be an "arm of the state" entitled to Eleventh Amendment immunity against Amtrak. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 288 F.3d 519 (3d Cir. 2002) (Pet. App. at 1a-24a). The Third Circuit determined that all elements of collateral estoppel had been met and that the PUC should therefore be precluded from relitigating the same claim against Amtrak. Pet. App. at 7a-11a. Specifically, the Third Circuit held that the district court's 1997 holding that the PUC was not an "arm of the state" was "essential to the judgment" for preclusion purposes. *Id.* at 9a-10a. As the Third Circuit correctly explained, "[i]f the

District Court had ruled differently on [the Eleventh Amendment] issue, it would have dissolved the outstanding injunction." *Id.* at 10a.

The Third Circuit also rejected the PUC's argument that equitable considerations should prevent the application of preclusion in this case. The court held that there was no reason to apply the "unmixed questions of law" exception to the doctrine of issue preclusion. The Third Circuit found that the district court's application of collateral estoppel had not "foreclose[d] the PUC from challenging a legal precept." *Id.* at 16a.[5] Thus, there was no unfairness in precluding the PUC from imposing on Amtrak "the burden of relitigating the application of the [applicable] legal principles to the unchanged circumstances of the PUC." *Id.* The Third Circuit also held that, although the case below and Amtrak's initial proceeding against the PUC presented distinct preemption issues, "the issue to which estoppel is sought does not arise in such a different context that the current situation implicates any of the concerns underlying the 'unmixed questions of law' doctrine." *Id.* The court thus affirmed the district court's holding that issue preclusion prevented the PUC from compelling Amtrak to relitigate the question of whether the PUC is an "arm of the state" entitled to Eleventh Amendment immunity.

The PUC sought rehearing of the Third Circuit's opinion. On November 22, 2002, the Third Circuit denied the PUC's

---

[5] In response to the PUC's submission to the district court of "evidence of its particular circumstances which supplemented its submission in 1997," the Third Circuit noted that the PUC "did not . . . submit any evidence that its circumstances had changed since [1997]." Pet. App. at 16a. The Third Circuit noted that "[t]he fact that the PUC may not have submitted all of the relevant evidence available to it in 1997, hardly justified placing on Amtrak the burden of relitigating the application of the *Christy* legal principles to the unchanged circumstances of the PUC." *Id.*

request for rehearing. Pet. App. at 75a-76a. The PUC then petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THE PUC IMPROPERLY SEEKS REVIEW OF QUESTIONS NOT PRESENTED TO OR DECIDED BY THE COURTS BELOW.

The PUC completely misunderstands the holding of the Third Circuit, and the Commission improperly seeks to have this Court review a question not presented by the case below and not decided by the Third Circuit. Contrary to the PUC's statement of issues, *see* Pet. at i, 8-10, this case does not concern whether there has been a valid congressional abrogation of Eleventh Amendment immunity or whether there has been a voluntary waiver/consent to suit in federal court. The courts below held that the PUC was precluded from relitigating a threshold question—whether the PUC is an "arm of the state" that is even entitled to claim Eleventh Amendment immunity in suits brought by Amtrak—and, thus, never reached the abrogation and waiver/consent issue raised by the PUC.[6] Because the Commission previously litigated this issue against Amtrak and lost in that prior action, the courts below held that it was precluded from attempting to relitigate its status for Eleventh Amendment purposes.

As the district court correctly observed in its 1998 decision denying the PUC's second request for reconsideration of the district court's immunity decision, because the PUC is not an "arm of the state," there was no reason to consider the issues of congressional abrogation or waiver. *See National R.R. Passenger Corp.*, 1998 WL 103377 at *2 n.1 ("the issue of abrogation was not dispositive because the Commission never

---

[6] In fact, the Commission concedes this at a later point in its petition. *See* Pet. at 21 ("[T]he issue to which the Third Circuit applied estoppel was whether the PA PUC is an arm of the state at all.").

established that it was an arm or alter ego of the state, and thus entitled to Eleventh Amendment immunity"). Those issues would be relevant only if the PUC had been held to be an "arm of the state" entitled to claim Eleventh Amendment immunity. The Commission does not meet this threshold, and thus the abrogation and waiver issues were not litigated or decided below. Indeed, the Third Circuit expressly distinguished the issue before it—"whether a party is an arm of the state and thus entitled to the cloak of immunity"—from the abrogation and waiver issues. Pet. App. at 23a-24a.

As a general rule, this Court "decline[s] to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget,* 486 U.S. 94, 99 n.5 (1988); *see* 17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4036, at 38 (2d ed. 1988). Where, as in this case, neither the district court nor the Third Circuit addressed the issues of abrogation or waiver/consent, this Court should not review those issues in the first instance. *See National Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459, 470 (1999); *see also Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 92 (2000). In fact, because the PUC failed to satisfy the threshold test of showing that it is an "arm of the state," the abrogation and consent/waiver issues were never placed before the courts below. Consequently, this Court should not review issues that were neither presented to nor decided by the lower courts, and it should deny the PUC's petition for writ of certiorari.

II. THE THIRD CIRCUIT PROPERLY APPLIED ISSUE PRECLUSION TO THE PUC'S CLAIM OF ELEVENTH AMENDMENT IMMUNITY AGAINST AMTRAK.

The PUC incorrectly argues that (a) its claim of sovereign immunity was not essential to the judgment for purposes of preclusion; (b) the Third Circuit's opinion conflicts with prior

rulings from this Court; and (c) that the "unmixed questions of law" exception to the application of issue preclusion applies to this case. None of these arguments has any merit.

A. Decision of a Claim of Eleventh Amendment Immunity Is "Essential" to the Judgment for Preclusion Purposes.

In its original 1997 decision that the PUC is not an "arm of the state" entitled to Eleventh Amendment immunity, the district court properly recognized that the Commission's "argument is necessarily a threshold question" that went to the very power of the district court to maintain the injunction. Pet. App. at 50a. The Third Circuit, in turn, correctly held that the district court's earlier finding that the PUC was not an "arm of the state" was essential to the district court's judgment. *Id.* at 10a. The Commission's assertion in its Petition that a claim of Eleventh Amendment immunity "is not essential to the judgment on the merits of the action in which the defense is raised," Pet. at 12, is therefore simply incorrect.

Jurisdiction over both the subject matter of the action and the parties is an essential requisite of any valid judgment. *Insurance Corp. v. Compagnie des Bauxites,* 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties") (citing *Stoll v. Gottlieb,* 305 U.S. 165, 171-72 (1938)); RESTATEMENT (SECOND) OF JUDGMENTS § 1 (1982) (noting that validity of judgment depends upon court having both subject matter and personal jurisdiction). Thus, if a state governmental entity enjoys Eleventh Amendment immunity, a federal court ordinarily will have no power to issue a judgment binding that entity. As a result, the district court's decision on the PUC's immunity claim was unquestionably "essential" to its judgment, and the PUC was properly precluded from relitigating its claim that it was an "arm of the state."

This Court has treated the jurisdictional bar of the Eleventh Amendment as similar to both subject matter jurisdiction and personal jurisdiction. *See Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 394-95 (1998) (Kennedy, J., concurring) (explaining "the hybrid nature of the jurisdictional bar erected by the Eleventh Amendment"); *id.* at 391 (opinion of the Court) (noting that this Court has not decided whether Eleventh Amendment immunity is a matter of subject matter jurisdiction). The precise nature of the immunity is not germane to this case, however, since this Court has held that even issues as fundamental to a court's authority as subject matter jurisdiction and personal jurisdiction are subject to preclusion. *Insurance Corp.,* 456 U.S. at 702 n.9.

Moreover, the PUC's argument is flatly contradicted by this Court's opinion in *Montana v. United States,* 440 U.S. 147 (1979). In that case, this Court held that the United States was collaterally estopped from relitigating the question of its sovereign immunity by a prior judgment on the immunity issue rendered by the Montana state courts. *Id.* at 152-53, 164. This Court noted that an element of collateral estoppel is that an issue must have been "necessarily determined" by a court of competent jurisdiction. *Id.* at 153. Obviously, this Court could not have held that the United States was collaterally estopped unless it determined that the issue of sovereign immunity was one that was essential to the prior judgment. But if one were to accept the PUC's novel interpretation of issue preclusion, then *Montana* would necessarily have been wrongly decided. Under the PUC's argument this Court could not have held the United States collaterally estopped, because the issue of the United States' sovereign immunity would not have been essential to the earlier judgment. The opinion in *Montana* therefore demonstrates conclusively that the PUC's argument is meritless.

B. The Third Circuit's Holding Is Entirely Consistent With This Court's Precedent.

The PUC also contends that the Third Circuit's opinion conflicts with this Court's opinion in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The PUC's argument is based on a simple misrepresentation of the holding in that case. *Metcalf & Eddy* does not hold, as the PUC would have it, that a determination on a claim of Eleventh Amendment immunity is not essential to the judgment in a proceeding. *See* Pet. at 13-14. Rather, that case stands only for the proposition that Eleventh Amendment immunity is an issue that is sufficiently separate from the *merits* of the action that the immunity issue is immediately appealable under the collateral order doctrine. *Metcalf & Eddy*, 506 U.S. at 144, 145.

This is quite different from saying that an immunity determination is not essential to the proceeding. In *Metcalf & Eddy*, the merits of the action concerned the respondent's claims for breach of contract and damages to its business reputation. *Id.* at 141. This Court's opinion held only that the immunity issue was sufficiently separate from the underlying merits of those claims to permit immediate appeal from the decision on the immunity question. *Id.* at 144-45. In this case, the PUC did appeal the district court's ruling to the Third Circuit, which ruled for Amtrak. Therefore, nothing in the Third Circuit's opinion conflicts in any way with this Court's holding in *Metcalf & Eddy*.[7]

---

[7] Nor does this Court's brief *per curiam* decision in *Mathias v. Worldcom Technologies, Inc.*, 535 U.S. 682 (2002) assist the PUC. That decision did nothing more than dismiss a writ of certiorari as improvidently granted and contains no analysis of the preclusion issue. In any event, such a dismissal says nothing about the merits of the case. *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973). Thus, contrary to the PUC's contentions, there is no "conflict" between *Mathias* and the Third Circuit's opinion in this case.

C. The "Unmixed Questions of Law" Exception to Collateral Estoppel Is Not Applicable to the PUC's Attempt to Relitigate its Alleged Entitlement to Eleventh Amendment Immunity.

1. The PUC's Contention That the Third Circuit Misapplied a Properly Stated Rule of Law Does Not Merit Certiorari.

The PUC does not dispute the Third Circuit's articulation of the "unmixed questions of law" exception to issue preclusion. Rather, the PUC disputes the Third Circuit's failure to apply that exception in this case. *See* Pet. at 19 ("[T]he Third Circuit has rendered a decision which is contrary to the dictates of the Restatement (Second) of Judgments, despite its claim that it has 'consistently applied this general rule in determining the collateral effect of federal court judgments'") (quoting Pet. App. at 6a). As a threshold matter, the PUC's argument that the Third Circuit merely misapplied a properly articulated rule of law does not merit this Court's review. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"). The PUC's argument fails to satisfy the conditions on which this Court will issue a writ of certiorari, and the petition should be denied on that basis alone.

2. The PUC's Status as an "Arm of the State" is Not a Pure, "Unmixed" Question of Law.

Nevertheless, even if application of the "unmixed questions of law" exception in this case turns on whether the PUC's entitlement to immunity is a "pure question of law," the PUC cannot meet that standard. To establish its immunity from suit under the Eleventh Amendment in the Third Circuit, the PUC must show that it is an "arm of the state," as it (unsuccessfully) attempted to do in connection with the 1997

judgment. *Christy*, 54 F.3d at 1144; *see National Railroad Passenger Corp.*, 1997 WL 597963, at *6 (Pet. App. at 55a); *accord Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 51-52 (1994). Whether the PUC is an "arm of the state," however, is not a pure question of law. Rather, it is a mixed question of law and fact that requires examination of both legal and factual issues relevant to the relationship between the entity and the state. *See Metcalf & Eddy,* 506 U.S. at 147 (noting that some Eleventh Amendment cases may present "difficult *factual* questions as to whether an agency is an 'arm of the State'") (emphasis added); *Christy*, 54 F.3d at 1150 (examining whether a judgment against the entity would come from the state treasury, the status of the entity under state law, and the degree of autonomy the entity enjoys).

Notably, the PUC's claims of error to the Third Circuit belie its contention that its status as an "arm of the state" entitled to Eleventh Amendment is a pure question of law. To the contrary, when the PUC sought to relitigate whether it is an "arm of the state" in this case, it "submitted additional *evidence* which supplemented its submission in 1997." Pet. App. at 16a (emphasis added). The Third Circuit echoed the PUC's acknowledgement of the factual nature of the PUC's immunity claim when it held that "[t]he fact that the PUC may not have submitted all of the relevant *evidence* available to it in 1997, hardly justifies placing on Amtrak the burden of relitigating the application of the Christy legal principles to the unchanged circumstances of the PUC." *Id.* (emphasis added). The PUC's implicit concession of the factual nature of the "arm of the state" inquiry continues in this Court. *See* Pet. at 10 ("The denial in the prior case was based upon the District Court's determination on the burden of proof under *Christy*, whether the PA PUC provided *sufficient proof of entitlement to the defense.* By affording preclusive effect to denial of immunity *based on insufficient offer of proof*, the Third Circuit effectively denies the PA PUC *any opportunity*

to offer additional proof to support the immunity claim in future suits brought by Amtrak.") (emphasis added).

A review of both the applicable case law and the PUC's own claims of error in this case make plain that the Commission's claim that it is an "arm of the state" is not a pure issue of law. The Third Circuit thus did not err in refusing to apply the "unmixed questions of law" exception in this case.

3. Even If the PUC's Alleged Entitlement to Immunity Were a Pure Issue of Law, Preclusion Would Still Be Appropriate.

Even assuming, *arguendo,* that the PUC's status as an "arm of the state" entitled to Eleventh Amendment immunity involves a pure issue of law, the Third Circuit's application of preclusion would nonetheless be proper. When a subsequent suit seeks relitigation of an issue decided in prior litigation between the same or closely related parties, the "unmixed questions of law" exception simply does not apply, regardless of whether the issue is one of law or one of fact:

> When the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion . . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in which it is essentially the same controversy, *even if the issue is regarded as one of "law."*

United States v. Stauffer Chem. Co., 464 U.S 165, 171 (1984) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment b (1982)) (emphasis added); *see United States v. Moser*, 266 U.S. 236, 242 (1924) ("[A] fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action"); *cf. Stauffer*, 464 U.S. at 171 n.4

("An exception which requires a rigid determination of whether an issue is one of fact, law or mixed fact and law, as a practical matter, would often be impossible to apply because 'the journey from a pure question of fact to a pure question of law is one of subtle gradations rather than one marked by a rigid divide'") (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment b (1982)). Thus, where, as here, the litigation involves the same issue that arose in prior litigation between the same parties, the fact that the issue is a question of law, as opposed to a mixed question of law and fact, does not bar application of issue preclusion between those parties. This rule applies equally to the issue of Eleventh Amendment immunity. *Montana*, 440 U.S. at 152-53, 164.

4. The Action Below and Amtrak's Initial Action Against the PUC Are Related, and the PUC's Claim of Immunity in this Case is Identical to its Claim in the Prior Litigation.

Moreover, even if one were to assume that the "arm of the state" inquiry is purely one of law, the PUC must also establish that this action and the prior action are "substantially unrelated." RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(a) (1982).[8] The PUC advocates an unjustifiably narrow view of "substantially unrelated" prong in order to stretch the limits of the "unmixed questions of law" exception to fit this case. This Court, however, has rejected the narrow view that the PUC asserts, and the PUC cites no authority to the contrary. *See* Pet. at 19.

---

[8] Alternatively, the PUC can seek to establish that relitigation is warranted to take account of an intervening change in the law or to avoid inequitable administration of the law. RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(b) (1982). The PUC does not allege that either of these alternatives provides a basis for relitigation.

The PUC's contention that the instant case and the prior action are "substantially unrelated" hinges on its assertion that the two cases involve different claims. *See id.* Yet, the particular issue that the PUC seeks to relitigate, that it is an "arm of the state" entitled to Eleventh Amendment immunity, is *identical* to the issue decided in the 1997 judgment. Indeed, in both cases the PUC's immunity argument served as a threshold issue. In addition, the record in this case demonstrates that the action below and Amtrak's earlier litigation against the PUC are closely related. Both cases involve claims by Amtrak that the RPSA preempts the PUC authority, as the Third Circuit properly recognized. *See id.* at 16a. Further, in the district court below, Amtrak asserted that the PUC's authority was preempted by 49 U.S.C. § 24301(g), a subsection of the very same section of the RPSA that was at issue in the earlier litigation.

The fact that a claim previously rejected in litigation between two parties is reasserted in subsequent litigation involving different facts or a different transaction does not make those two claims "substantially unrelated." *See Stauffer*, 464 U.S. at 172 n.5 (rejecting the government's argument that "two cases presenting the same legal issue must arise from the very same facts or transaction before an estoppel can be applied"); *accord Burlington N.R.R. v. Hyundai Merchant Marine Co.*, 63 F.3d 1227, 1237 (3d Cir. 1999) ("A party cannot satisfy the 'substantially unrelated claim' test where 'the same general legal rules govern both cases and . . . the facts of both cases are indistinguishable as measured by those rules'") (quoting 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4425 at 253-54 (1981)). Thus, issue preclusion will apply unless "'the issue of law' arises in a successive case that is *so unrelated* to the prior case that relitigation of the issue is warranted." *Burlington N.R.R.*, 63 F.3d at 1237 (citing *Stauffer*, 464 U.S. at 172 n. 5). Because the PUC has failed to show that the

"arm of the state" inquiry is a pure question of law, and has failed to establish that "the two actions involve claims that are substantially unrelated," the PUC cannot rely upon the "unmixed questions of law" exception to issue preclusion to relitigate whether it is an "arm of the state" entitled to immunity from suit against Amtrak. RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(a) (1982).

III. THE PUC'S HYPOTHETICAL CONCERNS ABOUT POSSIBLE CLAIMS OF OFFENSIVE NON-MUTUAL ESTOPPEL DO NOT WARRANT THIS COURT'S REVIEW.

Finally, the PUC argues that "[t]he Third Circuit's holding might be extended further through the application of offensive non-mutual collateral estoppel[.]" Pet. at 20. This concern is both misplaced and completely hypothetical. First of all, Amtrak's federal authorizing statute confers certain federal immunities from state and local jurisdictions crafted especially for Amtrak due in part to its unique status as owner and operator of a "valuable resource of the United States." 49 U.S.C. § 24101(a)(7); *see also* 49 U.S.C. § 24301(*l*) (Amtrak's immunity from state and local taxes, fees, or other charges); 49 U.S.C. § 24902(j) (Amtrak property exempted from state and local building, zoning, and similar or related laws). As the Third Circuit observed, "[t]he sole effect of estoppel in this context will be to afford Amtrak access to the federal courts (that other utilities may conceivably be denied) unless and until the circumstances of the PUC materially change." Pet. App. at 17a. It is not reasonable to assume, as the PUC does, that courts in the Third Circuit will fail to follow that court's affirmation that "the PUC will remain free to relitigate [whether it is an "arm of the state" entitled to immunity] with anyone else who hauls it into federal court." *Id.* at 16a. Nothing in the Third Circuit's opinion will preclude the PUC from litigating the issue of its Eleventh Amendment immunity with parties other than Amtrak, *see*

United States v. Mendoza, 464 U.S. 154, 164 (1984), and the Commission makes no claim here that it cannot relitigate the issue with other parties.[9]

Second, the PUC is in essence seeking an advisory opinion from this Court, because the present case does not raise questions of offensive *non-mutual* collateral estoppel, as the Third Circuit recognized. Pet. App. at 7a ("This is a case of offensive *mutual* estoppel.") (emphasis added). Should a party attempt to make offensive use of the preclusive effect of the 1997 judgment, the PUC will be able to argue the fairness of preclusion in that particular case, if such a case ever arises. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979) (preferable approach to problems of offensive non-mutual collateral estoppel is "to grant trial courts broad discretion to determine when it should be applied").

---

[9] The PUC contends that the Third Circuit's opinion creates a "Catch 22" for the Commission. Pet. at 21. The PUC asserts that this Court's statement in *Mendoza* that "the government is free to litigate that issue in the future with some other party," 464 U.S. at 164, may not apply to the PUC "if it is decided that the PA PUC is not an arm of the state[.]" Pet. at 21. The Commission does not explain why it would be prevented from relitigating this issue with parties other than Amtrak, and it is apparent that the PUC conflates two distinct concepts. The Commission may be a "governmental" entity without being an "arm of the state." Indeed, this Court's cases make clear that there exist entities which, while clearly "governmental," are simply not arms of the state. *See, e.g., Alden v. Maine,* 527 U.S. 706, 756 (1999) (immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state"); *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (this "Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities 'exercise a slice of state power'").

IV. THE ISSUE OF THE PUC'S CLAIMED IMMUNITY WILL NOT "EVADE REVIEW" IF CERTIORARI IS DENIED.

In the event that the district court decides substantive issues in this case while this Petition is pending, the PUC contends that application of collateral estoppel to its argument that it is an "arm of the state" immune from suit by Amtrak [10] is subject to an exception to the mootness doctrine for issues that are "capable of repetition, yet evade review." The PUC's attempt to apply the principles of this exception to this case is unwarranted.

"The capable of repetition yet evading review rule is an extraordinary and narrow exception to the mootness doctrine," applied only in "extraordinary circumstances." *Minnesota Humane Society v. Clark*, 184 F.3d 795, 797 (8th Cir. 1999) (citations and quotations omitted). As reflected by the words of the exception, an issue must be likely to evade review to merit its application. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Claims for which there is adequate time to litigate a claim fully, as is true for the underlying case, are unlikely to "evade review." *See id.* (noting that the exception requires that "the challenged action was in its duration too short to be fully litigated").

This case does not fall within the "capable of repetition, yet evading review" exception. Notably, the PUC fails to cite any authority applying that exception to the mootness doctrine to issue preclusion. Indeed, because the PUC's assertion of harm should this case "evade review" assumes the accuracy of the PUC's underlying claim of immunity

---

[10] The PUC does not contend, nor can it, that it is precluded from litigating whether it is an "arm of the state" entitled to immunity from suit against any other party, save Amtrak. *See* Pet. App. at 16a (noting that the PUC remains free to relitigate whether it is an "arm of the state" entitled to immunity from suit against anyone but Amtrak).

in suits brought by Amtrak, the PUC turns the doctrine of issue preclusion on its head and ignores the purpose of that doctrine.

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.'" *Montana*, 440 U.S. at 153 (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)). Issue preclusion ensures that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involveing a party to the prior action." *Montana*, 440 U.S. at 153 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)).

The PUC was given a full and fair opportunity to establish that it is an "arm of the state" entitled to immunity from suit against Amtrak. If the PUC believed the district court's 1997 judgment that it is not an "arm of the state" and therefore does not enjoy Eleventh Amendment immunity in litigation against Amtrak was in error, the proper avenue was to appeal that judgment. The PUC did not do so. The PUC's repeated attempts to litigate an issue it lost against Amtrak in 1997 [11] eviscerate the central purposes of issue preclusion and Amtrak's right to repose. *See Montana*, 440 U.S. at 153-54 (the purpose of issue preclusion is to protect victorious parties "from the expense and vexation attending multiple lawsuits," to "conserve judicial resources," and to "foster[] reliance on

---

[11] *See Southeastern Pennsylvania Trans. Auth. v. Pennsylvania Pub. Util. Comm'n*, 210 F. Supp. 2d 689, 715 (E.D. Pa. 2002) ("PUC's first argument, that it is an 'arm of the state' is a nonstarter. It has been rejected no fewer than four times in cases involving Amtrak and PUC.").

judicial action by minimizing the possibility of inconsistent decisions." Having lost its underlying claim of immunity against Amtrak, the basis for PUC's request for review is legally precluded. *See Stauffer*, 464 U.S. at 174 (applying collateral estoppel to preclude the government from relitigating a claim against the same party).

Even if the issue of whether the PUC is an "arm of the state" entitled to immunity "evades review" in this particular case, it will be a result of the PUC's failure to diligently pursue a stay of the underlying case and a swift resolution of its appeal of the application of collateral estoppel. *See In re Kulp Foundry*, 691 F.2d 1125, 1130 (3d Cir. 1982) ("Lack of prompt and diligent action in taking an appeal is also determinative of whether the case falls within the [capable of repetition, yet evading review] exception to the mootness doctrine"). In fact, the PUC did not seek to stay the substantive case in the district court for over a year and a half *after* that court denied the PUC's motion to dismiss on May 10, 2001. Only after the PUC lost its appeal in the Third Circuit on May 1, 2002 and then lost its request for rehearing *en banc* on November 22, 2002 did the PUC seek a limited stay of the issuance of the mandate by the Third Circuit.[12] That belated request by the PUC, however, only sought a stay of the issuance of the mandate until February 20, 2003, which was then denied. Moreover, after having delayed appeal to this Court by filing a motion for rehearing *en banc* in the Third Circuit rather than an immediate petition for a writ of certiorari, the PUC caused further delay by seeking an additional 30 days in which to file its Petition, thereby extending the time between the Third Circuit's denial of a rehearing and its filing of a petition to approximately four months. The PUC's lack of diligence in avoiding mootness is

---

[12] The PUC cannot reasonably claim that the fact that the district court placed the merits of the case in abeyance pending resolution of issues subject to arbitration justifies its lack of diligence in this regard.

fatal to any attempt to avail itself of an exception thereto. *See New York City Employees' Retirement Sys. v. Dole Food Co., Inc.*, 969 F.2d 1430, 1435 (2d Cir. 1992) ("Where prompt application for a stay pending appeal can preserve an issue for appeal, the issue is not one that will evade review") (citation and quotation omitted); *Kulp*, 691 F.2d at 1130 ("If Kulp has acted quickly, this action would not be 'in its duration too short to be fully litigated prior to its cessation or expiration'") (citing *Illinois State Board of Elections v. Sociality Workers Party*, 440 U.S. 173, 187 (1979)).

CONCLUSION

The PUC's petition does not meet this Court's criteria for issuance of a writ of certiorari, and the petition should be denied on that ground alone. The PUC seeks review of questions neither presented to nor passed upon by the lower courts, and they are thus not properly before this Court. In addition, the PUC's claims amount, at most, to an assertion that the Third Circuit improperly applied a properly stated rule of law. Once again, such a claim does not satisfy this Court's criteria for issuance of a writ.

On the merits, the district court's and the Third Circuit's applications of the doctrine of issue preclusion to prevent the PUC from relitigating its claim to Eleventh Amendment immunity are completely consistent with this Court's precedents. The Third Circuit did not err in refusing to apply the "unmixed questions of law" exception to issue preclusion to this case because the PUC's claimed status as an "arm of the state" is not a pure question of law and because the two cases in which the Commission's claim for immunity arose are not "substantially unrelated" for purposes of the exception.

Accordingly, this Court should deny the PUC's petition for a writ of certiorari.

Respectfully Submitted,

JOHN L. MOORE, JR.*
CRISTEN E. SIKES
PIPER RUDNICK, LLP
1200 19th Street, NW
Washington, D.C. 20036
(202) 861-3900

DENNIS M. MOORE
SENIOR ASSOCIATE GENERAL
COUNSEL, LITIGATION NATIONAL
RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, NE
Washington, D.C. 20002
(202) 906-2750

Attorneys for National Railroad Passenger Corporation

* Counsel of Record